

DECISION

D. Apperson
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

8354

FILE: B-191642

DATE: November 17, 1978

MATTER OF: Joe F. McLeod - Claim for Backpay

- DIGEST:**
1. Employee of Department of the Army claims retroactive promotion and backpay for period of alleged wrongful classification. Claimant has no entitlement to backpay as civil service regulation provides for retroactive effective date for classification only when there is a timely appeal which results in the reversal, in whole or in part, of a downgrading or other classification action which has resulted in the reduction of pay. See 5 C.F.R. 532.702(b)(9) and ct. cases and Comp. Gen. decs. cited.
 2. Employee of Department of the Army claims a retroactive promotion and backpay for alleged improper detail to higher grade position in excess of 120 days. Agency has denied claim on basis that the established and classified higher grade position to which the employee alleges detail was not vacant. Agency should take action to determine whether employee was in fact detailed to and performed duties of higher grade position in excess of 120 days. There is no requirement under Turner-Caldwell, 56 Comp. Gen. 427 (1977), that an established and classified position be vacant in order to entitle an employee to retroactive temporary promotion and backpay incident to details to higher grade position. See Comp. Gen. decs. cited.

This action concerns an appeal by Mr. Joe F. McLeod, an employee of the Department of the Army, Fort Bragg, North Carolina, of the action of our Claims Division on December 15, 1977, which disallowed Mr. McLeod's claim for a retroactive promotion and backpay for the period November 19, 1967, to February 23, 1975. The issue before our Claims Division involved Mr. McLeod's allegations that he was improperly classified during the period of his claim. On appeal of the disallowance, he alleges that he was also detailed to a higher grade position during the period June 6, 1971, to February 23, 1975.

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Pursuant to 31 U.S.C. 71a (Supp. V, 1975), any claim or demand against the United States is barred unless it is presented to the General Accounting Office within 6 years from the date such claim accrued. Since Mr. McLeod's claim was not received in our Claims Division until June 9, 1976, all elements of his claim accruing before June 9, 1970, are barred.

The record shows that during the period June 9, 1970, to February 23, 1975, Mr. McLeod occupied the position of Cooks Helper, WG-05, at Fort Bragg, North Carolina. A review of Mr. McLeod's claim for backpay by the Civilian Personnel Office (CPO), Fort Bragg, in May 1976, disclosed that Mr. McLeod had "apparently performed the duties of Cook WG-08."

Mr. McLeod states that the denial of a retroactive promotion and accompanying backpay for the period during which he performed higher grade duties would be a denial of the principle of equal pay for equal work. Generally an employee of the Government is entitled only to the salary of the position to which he has been appointed regardless of the duties he may perform. See Coleman v. United States, 100 Ct. Cl. 42 (1943); Dianish v. United States, 183 Ct. Cl. 702 (1968); and Matter of Patrick L. Peters, B-189663, November 23, 1977. An employee who is performing duties of a grade level higher than that of the position to which he is appointed is not entitled to the salary of a higher level position unless and until the position is classified to the higher grade and he is promoted to it. Matter of Marion McCaleb, 55 Comp. Gen. 515 (1975).

The job grading or classification of prevailing rate positions is governed by 5 U.S.C. 5346 (1976) which empowers the Civil Service Commission (Commission) to prescribe regulations regarding the classification of positions. Under the Commission's regulations the only provisions for a retroactive effective date for classification is when there is a timely appeal which results, in whole or in part, of a downgrading or other classification action which had resulted in the reduction of pay. See 5 C.F.R. 532.702(b)(9). The provisions governing the classification appeal of Wage Grade employees are set forth in 5 C.F.R. Part 532, Subpart G (1978).

In United States v. Testan, et al., 424 U.S. 392 (1976), The United States Supreme Court held that there is no substantial right to backpay for periods of wrongful position

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classification where the pertinent classification statutes, 5 U.S.C. 5101-5115, did not expressly make the United States liable for pay lost through an improper classification. Neither does the classification statute applicable in this instance, 5 U.S.C. 5346 (1976), contain any express provision making the United States liable for pay lost during a period of improper classification. In addition, the court held in Testan, supra, that the Back Pay Act, 5 U.S.C. 5596 (1976), does not afford a remedy for periods of erroneous classification.

In contrast to an accretion of duties an employee may be detailed to a higher level position. A detail is the temporary assignment of an employee to a different position within the same agency for a brief, specified period, with the employee returning to regular duties at the end of the detail. See Federal Personnel Manual, chapter 300, subch. 8, para. 8-1. We have held that employees who are detailed to a higher grade position for more than 120 days without Commission approval are entitled to retroactive temporary promotions with backpay for the period beginning with the 121st day of the detail until the detail is terminated. Matter of Marie Grant, 55 Comp. Gen. 785 (1976); and Matter of Reconsideration of Turner-Caldwell, 56 Comp. Gen. 427 (1977).

Mr. McLeod states that effective June 6, 1971, he was detailed to the position of First Cook, WG-08. As noted above the agency's May 1976 investigation of Mr. McLeod's claim for backpay resulted in a determination that Mr. McLeod "apparently performed the duties of Cook WG-8." However, the agency has not made a determination as to whether the performance of such duties was the result of an official detail to the position of Cook, WG-8 or whether it was the result of an accretion of duties.

The agency has denied Mr. McLeod's claim for backpay, in connection with his alleged detail, on the basis that the officially classified and established Cook, WG-8 positions were not vacant during the period of Mr. McLeod's claim but were occupied by other employees. There is no necessity that an established and classified position be vacant as a condition for considering retroactive action under Turner-Caldwell, supra. See Matter of Roy F. Ross and Everett A. Squire, B-191266, June 12, 1978, and B-183086, September 7, 1978, 57 Comp. Gen. ____.

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We are unaware of any other requirement that a position be vacant in order for an employee to be detailed to that position.

Accordingly, this matter is being returned to the agency for an official finding of fact as to whether Mr. McLeod was in fact detailed to the position of Cook, WG-8. If it is determined that Mr. McLeod was in fact detailed to the higher grade position of Cook, WG-8, he may be granted a retroactive temporary promotion with accompanying backpay, if otherwise proper, from the 121st day after the beginning of the detail until he was no longer required to perform the duties of the higher grade position.

Deputy

R. G. K. J.
Comptroller General
of the United States